Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-019976 05/23/2012

HONORABLE GEORGE H. FOSTER, JR.

CLERK OF THE COURT
L. Stogsdill
Deputy

PATRICIA DE MEO

ANNA DAHLQUIST

v.

BANK OF NEW YORK MELLON, THE, et al.

CHARLES PICCUTA

DANIEL ANDREWS
NO ADDRESS ON RECORD
JEROME J GRAVES
NO ADDRESS ON RECORD
PRINCIPAL RESIDENTIAL GROUP LLC
NO ADDRESS ON RECORD
BANK OF NEW YORK TRUST COMPANY, THE
NO ADDRESS ON RECORD

UNDER ADVISEMENT RULING

The Court took under advisement the matter of the Defendant's Motion to Dismiss the Complaint. The Court has considered Defendant Bank of New York Mellon's Motion to Dismiss and Memorandum of Points and Authorities, electronically filed March 19, 2012, the Response to Defendant Bank of New York Mellon's Motion to Dismiss, electronically filed April 9, 2012, and the Reply to Plaintiff's Response to Defendant Bank of New York Mellon's Motion to Dismiss, electronically filed April 27, 2012 and finds as follows:

The Plaintiff has alleged 5 causes of action against the Defendant. The causes include abuse of process, bad faith eviction, ouster, intentional infliction of emotional distress against the

Defendant Bank of New York Mellon, intentional infliction of emotional distress against Defendant Andrews and through the doctrine of *respondeat superior* against Defendant Mellon.

Arizona Courts assess the sufficiency of a claim under Rule 8's requirement that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Under Rule 8, Arizona follows a notice pleading standard, the purpose of which is to "give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved." *Mackey v. Spangler,* 81 Ariz. 113, 115, 301 P.2d 1026, 1027–28 (1956).

If a pleading does not comply with Rule 8, an opposing party may move to dismiss the action for "[f]ailure to state a claim upon which relief can be granted." Ariz. R. Civ. P. 12(b)(6). When adjudicating a Rule 12(b)(6) Motion to Dismiss, Arizona courts look only to the pleading itself and consider the well-pled factual allegations contained therein. *See, e.g.*, *Dressler v. Morrison*, 212 Ariz. 279, 281 ¶ 11, 130 P.3d 978, 980 (2006); *Long v. Ariz. Portland Cement Co.*, 89 Ariz. 366, 367–68, 362 P.2d 741, 742 (1961). Courts must also assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom. *Doe ex rel. Doe v. State*, 200 Ariz. 174, 175 ¶ 2, 24 P.3d 1269, 1270 (2001); *Long*, 89 Ariz. at 367, 362 P.2d at 742. Because Arizona Courts evaluate a Complaint's well-pled facts, mere conclusory statements are insufficient to state a claim upon which relief can be granted. The inclusion of conclusory statements does not invalidate a Complaint, *Long*, 89 Ariz. at 369, 362 P.2d at 743, but a Complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy Arizona's notice pleading standard under Rule 8.

In this case the Defendant argues that the Plaintiff has failed to state a claim for, *inter alia,* abuse of process. The essential elements of the tort of abuse of process include (1) a willful act in the use of judicial process; (2) for an ulterior purpose not proper in the regular conduct of the proceedings. We consider this second requirement to be essentially equivalent to the Restatement's element requiring a showing that the process has been used primarily to accomplish a purpose for which the process was not designed. *Nienstedt v. Wetzel***,** 133 Ariz. 348, 651 P.2d 876(Ariz.App.,1982).

The Court questioned whether the second element had been sufficiently plead. Plaintiff's response includes facts that are outside the pleadings. Ordinarily, reliance on evidence extrinsic to the pleadings requires the Court to treat a Motion to Dismiss as a Motion for Summary Judgment. *Dube v Litkins*, 216 Ariz. 406, 167 P.3d 93 (App 2007). Page 5 of the Plaintiff's Response sets forth facts that are not stated in the Complaint and, in the Response, the facts are not supported by Affidavit. Rather, the Complaint makes a vague reference to the alleged ulterior motive as "Defendant Mellon's likely purpose was to avoid its obligations as provided for in the PFTA and to avoid a land-lord tenant relationship." The response elucidates what the Complaint seems to attempt to state. However, the Complaint is vague and insufficient

as submitted to provide sufficient notice of the claim and a more definite statement is necessary to eliminate would otherwise be merely a conclusory statement. Inasmuch as it appears the defect may be cured by amendment such leave should be granted. *Dube, supra*.

IT IS ORDERED, the Motion to Dismiss Count I is granted without prejudice. Plaintiff shall have leave to amend the Complaint to make a more definite statement as to the alleged ulterior motive of the Defendant Mellon.

Count II alleges that the Defendant Mellon initiated eviction proceedings in bad faith against the Plaintiff. It alleges that the Defendant in connection with its proceedings to evict the Plaintiff misrepresented to the Court a material fact. The Complaint alleges the Defendant knew or should have known that the notice it gave in the process of evicting the Plaintiff was improper. Finally, the Complaint alleges on this issue the Court relied on this misrepresentation and used it to enter an Order evicting the Plaintiff. The Court questioned whether there is a recognized cause of action for "Bad Faith Eviction." The Plaintiff cites no such authority in her Memorandum and the Court has found no cases establishing such a cause.

The Court does note that the Residential Landlord and Tenant Act imposes on parties subject thereto the duty to perform under that law and to exercise every right and remedy in good faith. ARS § 33-1311. And, Rule 4(b) of the Rules of Procedure for Eviction Actions also has a good faith requirement. However, this Court has not found any annotations, and the Plaintiff has not cited any case, that indicates a cause of action arises for a breach of that duty in a case such as this involving a lender who has foreclosed a Deed of Trust on a residential property that was leased at the time of the Trustee's Sale and a subsequent eviction action. The Plaintiff argues that *Farr v Transamerica* is such a case. That case is inapposite as it involves a claim for bad faith case arising out of an insurance contract between the litigants, not a landlord tenant matter where the owner has obtained title to the property by virtue of the foreclosure of the underlying mortgage, which essentially wiped out the lease between the tenant and the prior owner. No agreement exists between the Plaintiff and the Bank to even establish the notion that the covenant of good faith and fair dealing should be applicable here.

The rules of procedure for eviction actions provide that a Court may award sanctions for a breach of the duty of good faith. But again, nothing has been found by this Court indicating that aside from the sanctions under Rule 4(c) an independent cause of action exists for the breach of that duty.

IT IS ORDERED, granting the Motion to Dismiss Court II of the Complaint.

The Defendant seeks to dismiss the claims against it for intentional infliction of emotional distress based on the doctrine of *respondeat superior*. According to the doctrine of

respondeat superior, "an employer is vicariously liable only for the behavior of an employee who was acting within the course and scope of his employment." *Pruitt v. Pavelin*, 141 Ariz. 195, 205, 685 P.2d 1347, 1357 (App.1984); *Scottsdale Jaycees v. Superior Court of Maricopa County*, 17 Ariz.App. 571, 574, 499 P.2d 185, 188 (1972). In Arizona, "[t]he conduct of a servant is within the scope of employment if it is of the kind the employee is employed to perform, it occurs substantially within the authorized time and space limit, and it is actuated at least in part by a purpose to serve the master." *Love v. Liberty Mut. Ins. Co.*, 158 Ariz. 36, 38, 760 P.2d 1085, 1087 (App.1988); *Duncan v. State*, 157 Ariz. 56, 61, 754 P.2d 1160, 1165 (App.1988). As explained by the Court in *Ray Korte Chevrolet v. Simmons*, 117 Ariz. 202, 207, 571 P.2d 699, 704 (App.1977):

> Under Arizona law, an employee is acting within the scope of his employment while he is doing any reasonable thing which his employment expressly or impliedly authorizes him to do or which may reasonably be said to have been contemplated by that employment as necessarily or probably incidental to the employment.

In other words, an employer is liable for the conduct of its employee if at the time the injury occurred "the employee was performing a service in furtherance of [the] employer's business." *Ohio Farmers Ins. Co. v. Norman*, 122 Ariz. 330, 332, 594 P.2d 1026, 1028 (App.1979).

The problem in this case is that the Complaint fails to allege that an employee of the Defendant Mellon acted wrongfully within the course and scope of his/her employment. Rather, the Complaint seems to indicate that someone else's employee did so. "The general rule is that while an employer is liable for the negligence of its employee under the doctrine of respondeat superior, an employer is not liable for the negligence of an independent contractor." *Wiggs v. City of Phoenix*, 198 Ariz. 367, 369, ¶ 7, 10 P.3d 625, 627 (2000). An agent is an independent contractor, rather than an employee, if the employer or principal exercises no control over and has no right to exercise control over how the agent performs its service. *Id*. at 370, ¶ 10, 10 P.3d at 628 (employer instructs independent contractor "on what to do, but not how to do it"); *Bible v. First Nat'l Bank of Rawlins*, 21 Ariz.App. 54, 56–57, 515 P.2d 351, 353–54 (1973) (repossession company was independent contractor where "how, when, who, and where" of the repossession were left to the discretion of the repossession company). Nothing in the Complaint clarifies that the alleged wrongdoers were employees of the Defendant or agents clothed with the sufficient control required under the law to impose liability on the Defendant Mellon. The facts alleged result in the same treatment of Counts IV and V

IT IS ORDERED, granting the Motion to Dismiss Counts IV and V against Mellon without prejudice. The Plaintiff is granted leave to amend if it is able to plead, in good faith and

in compliance with Rule 11, that a cause of action under the theory of *respondeat superior* exists based on specific facts.

The Defendant Mellon seeks dismissal of the Plaintiff's ouster claim. The Plaintiff again provides in her response certain facts not plead in the Complaint that might if alleged, support a claim for ouster. In this regard, the Complaint is deficient based on ***Schaefer v. Murphey*****,** 131 Ariz. 295, 640 P.2d 85 (Ariz., 1982). However leave to amend should be granted where, as here, there appears to be the possibility that a proper cause of action may be asserted.

IT IS ORDERED, dismissing Court III without prejudice. The Plaintiff may file an Amended Complaint to cure the defects set forth in Count III if, under Rule 11, facts can be plead in support of ouster under the law.

IT IS ORDERED any amended pleadings shall be filed within thirty (30) days following the entry of this Order.

5/23/12

_____ _____/s/ HONORABLE GEORGE H. FOSTER, JR.

DATE **Hon. GEORGE H. FOSTER, JR.**

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated

on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.